

# **JOURNAL OF THE SENATE**

## **EIGHTY-SEVENTH SESSION**

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THIRD DAY

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STATE OF SOUTH DAKOTA  
Senate Chamber, Pierre  
Thursday, January 12, 2012

The Senate convened at 2:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Mercy Hobbs, followed by the Pledge of Allegiance led by Senate page Courtney Chester.

Roll Call: All members present except Sen. Krebs who was excused.

### **APPROVAL OF THE JOURNAL**

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the second day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,  
Bob Gray, Chair

Which motion prevailed.

**HONORED GUESTS**

The President introduced Nicole Keegan, Rapid City, 2011 Milken Educator and Pat Moller, Mitchell, 2012 South Dakota Teacher of the Year to the body.

**REPORTS OF STANDING COMMITTEES**

MR. PRESIDENT:

The Committee on Judiciary respectfully reports that it has had under consideration SB 13, 53, and 54 and returns the same with the recommendation that said bills do pass.

Also MR. PRESIDENT:

The Committee on Judiciary respectfully reports that it has had under consideration SB 12 and returns the same with the recommendation that said bill do pass and be placed on the consent calendar.

Respectfully submitted,  
Craig Tieszen, Chair

MR. PRESIDENT:

The Committee on Commerce and Energy respectfully reports that it has had under consideration SB 27 and returns the same with the recommendation that said bill do pass.

Also MR. PRESIDENT:

The Committee on Commerce and Energy respectfully reports that it has had under consideration SB 7, 26, and 28 and returns the same with the recommendation that said bills do pass and be placed on the consent calendar.

Also MR. PRESIDENT:

The Committee on Commerce and Energy respectfully reports that it has had under consideration SB 11 and returns the same with the recommendation that said bill be amended as follows:

1 11oa

2 On page 1, line 11, of the printed bill, delete "and expend" and insert ", expend, or loan".

3 And that as so amended said bill do pass.

4 Respectfully submitted,  
5 Tom Nelson, Chair

6 **REPORTS OF JOINT-SELECT COMMITTEES**

7 Sen. Gray moved that the report of the Joint-Select Committee relative to compensation  
8 for the elected and appointed officers and employees for the Eighty-seventh Legislative Session  
9 as found on page 43 of the Senate Journal be adopted.

10 The question being on Sen. Gray's motion that the report of the Joint-Select Committee  
11 relative to compensation for the elected and appointed officers and employees for the Eighty-  
12 seventh Legislative Session as found on page 43 of the Senate Journal be adopted.

13 And the roll being called:

14 Yeas 34, Nays 0, Excused 1, Absent 0

15 Yeas:

16 Adelstein; Begalka; Bradford; Brown; Buhl; Cutler; Frerichs; Fryslic; Gray; Hansen (Tom);  
17 Haverly; Heineman; Holien; Hundstad; Hunhoff (Jean); Johnston; Juhnke; Kraus; Lederman;  
18 Maher; Nelson (Tom); Nygaard; Olson (Russell); Peters; Putnam; Rampelberg; Rave; Rhoden;  
19 Schlekeway; Sutton; Tidemann; Tieszen; Vehle

20 So the motion having received an affirmative vote of a majority of the members-elect, the  
21 President declared the motion carried.

22 Sen. Gray moved that the report of the Joint-Select Committee relative to making  
23 arrangements for the legislative days for the Eighty-seventh Legislative Session as found on  
24 page 44 of the Senate Journal be adopted.

25 Which motion prevailed.

26 Sen. Rhoden moved that the report of the Joint-Select Committee relative to the selection  
27 of chaplains for the Eighty-seventh Legislative Session as found on page 41 of the Senate  
28 Journal be adopted.

29 Which motion prevailed.

1 Sen. Brown moved that the report of the Joint-Select Committee relative to legislative  
2 printing and distribution of bills and journals for the Eighty-seventh Legislative Session as  
3 found on page 41 of the Senate Journal be adopted.

4 Which motion prevailed.

5 Sen. Vehle moved that the report of the Joint-Select Committee relative to the  
6 arrangements for a memorial service for the Eighty-seventh Legislative Session as found on  
7 page 40 of the Senate Journal be adopted.

8 Which motion prevailed.

### 9 MOTIONS AND RESOLUTIONS

10 Sen. Olson moved that when we adjourn today, we adjourn to convene at 12:30 p.m. on  
11 Friday, January 13, the 4<sup>th</sup> legislative day.

12 Which motion prevailed.

### 13 MESSAGES FROM THE HOUSE

14 MR. PRESIDENT:

15 I have the honor to inform your honorable body that the House has adopted the report of  
16 the Joint-Select Committee relative to making arrangements for a memorial recognition of  
17 deceased former members of the Senate and House.

18 Also MR. PRESIDENT:

19 I have the honor to inform your honorable body that the House has adopted the report of  
20 the Joint-Select Committee for the purpose of securing chaplains for the Eighty-seventh  
21 Legislative Session.

22 Also MR. PRESIDENT:

23 I have the honor to inform your honorable body that the House has adopted the report of  
24 the Joint-Select Committee relative to making arrangements for the distribution of the official  
25 directory, Senate and House Journals, bills, and other legislative printing.

1 Also MR. PRESIDENT:

2 I have the honor to inform your honorable body that the House has adopted the report of  
3 the Joint-Select Committee relative to setting the compensation schedule for the elective and  
4 appointive officers and members of the Eighty-seventh Legislative Session.

5 Also MR. PRESIDENT:

6 I have the honor to inform your honorable body that the House has adopted the report of  
7 the Joint-Select Committee for the purpose of arranging legislative days for members, officers,  
8 and employees of the House and Senate.

9 Respectfully,  
10 Karen Gerdes, Chief Clerk

11 Sen. Begalka moved that the Senate do now adjourn, which motion prevailed and at  
12 2:25 p.m. the Senate adjourned.

13 Fee Jacobsen, Secretary

14 **JOINT SESSION**

15 Pursuant to the Joint-Select Committee Report found on page 12 of the Senate Journal, the  
16 following is Chief Justice David Gilbertson's State of the Judiciary Message:

17 **STATE OF THE JUDICIARY MESSAGE**  
18 **JANUARY 2012**

19 **DAVID GILBERTSON**  
20 **CHIEF JUSTICE**

21 Governor Dugaard, Lieutenant Governor Michels, members of the Legislature,  
22 Constitutional Officers, my fellow Justices, Judges, UJS employees and all citizens of the State  
23 of South Dakota:

24 Every 4th of July we celebrate Independence Day. All citizens rejoice that we are a free and  
25 independent country. However the reverse of independence is "dependence" which also has  
26 merit. The Legislature is elected by the public to pass the statutes which govern the lives of  
27 citizens and raise the needed revenue to operate state government. Yet, when the legislative  
28 session ends, the Legislature goes home and is dependent on the executive branch to carry out  
29 those laws. Both branches are dependent upon the judiciary to interpret the laws and to  
30 determine if they are being correctly carried out or if they are infringing upon the rights of the  
31 people. Each branch is dependent on the other two for the operation of state government. This

1 ensures no single branch becomes so powerful that it assumes authority in excess of what the  
2 people have authorized. While there will probably never be a "Dependence Day," the concept  
3 certainly has its place in a system of limited government.

4 Dependence also ensures that our form of government maintains its vitality and does not  
5 become a mere sham. Nearly every country in the world has a constitution with splendid  
6 guarantees of rights to its citizens. We would do well to remember the cynical observation of  
7 Soviet dictator Joseph Stalin: "Democracy is a wonderful thing. As far as I am concerned you  
8 can vote for anyone you want--as long as I get to count the ballots." Democracy is more than just  
9 having an election to pick leaders. For democracy to succeed, it must arise from a country or  
10 state that has stable institutions and an informed electorate. It must also have the rule of law.  
11 The law is a positive force only where one uses it lawfully.

12 Our dependence upon each other as individuals in the face of adversity was brought home  
13 to us with stark realism in the floods of last summer. Residents who lived along the Missouri  
14 River, many of whom worked for the State of South Dakota, were faced with protecting their  
15 homes and property. This task was beyond the capabilities of any individual or family. However,  
16 thousands of other people pitched in, in any way they could, to provide assistance to their  
17 neighbors in distress. Millions of sandbags were filled by individuals of all ages and walks of  
18 life. The common denominator was a desire to help those who were in distress.

19 Dependence does not end there. Many who were displaced from their homes also held  
20 essential jobs in state government. Even though they were battling to save their homes, some  
21 living in make-shift quarters, all still carried on at their positions with a professionalism that to  
22 a casual observer would indicate nothing was amiss. They knew others were dependent upon  
23 them to carry on. Due to such dedication, the Unified Judicial System continued to operate with  
24 no disruption in service to the public.

## 25 FINANCES AND THE COURTS

26 For the past several years finances have dominated how this state and other states provide  
27 services to their citizens. Our court system was not immune from the lack of governmental  
28 funds. Last year the Unified Judicial System was faced with a request for a 10% cut in its  
29 general funds. This was cause for great concern to me because it appeared to require laying-off  
30 employees who deal with probationers, eliminating our clerk presence in several courthouses,  
31 and other possible cuts in essential judicial services. Discussions with legislative leadership, the  
32 Governor and the Lt. Governor were able to produce a one year formula where we met the  
33 10% budgetary reduction without any layoffs or courthouse closings. Thus, the public continued  
34 to receive essential judicial services. These productive discussions showed the way that creative  
35 ideas can come about when all work toward a common goal. At the height of the Civil War  
36 Abraham Lincoln stated, "The dogmas of the quiet past are inadequate to the stormy present.  
37 The occasion is piled high with difficulty, and we must rise with the occasion. As our case is  
38 new, so we must think anew and act anew." In this budgetary instance, the three branches of this  
39 government did so.

40 No one welcomes the current recession. Nevertheless there are some benefits resulting from  
41 our situation. While I am not proposing that the name of the Unified Judicial System be changed  
42 to Unified Judicial System, Incorporated, we adopted certain business principles which resulted

1 in a more efficient and economic operation. Although it is not my purpose to bore you with a  
2 laundry list of changes, a couple of examples are informative on where savings can be achieved  
3 if one only looks.

4 Each Thursday the South Dakota Supreme Court issues its opinions for that week. Every  
5 judge in the state received a hard copy of these opinions. This required 52 mailings a year. Now  
6 opinions are e-mailed to the judges eliminating the mailing of a hard copy. The taxpayers save  
7 \$15,000 per year in printing and postage costs. The judges also benefit by receiving opinions  
8 in a matter of seconds rather than waiting days for the mail to arrive.

9 Every year the Supreme Court holds its March term at the University of South Dakota  
10 School of Law. The Court used to print a booklet with a two-page summary of each of the nine  
11 cases the Court was going to hear that week. The booklet was available to law students, faculty,  
12 and the public. We now post these summaries on the Internet instead of printing them. The  
13 annual savings is \$3,500. Moreover, the students, faculty, and public no longer wait until our  
14 arrival to obtain the booklets and learn what cases we will be hearing. Now they can access  
15 these summaries weeks in advance of our arrival which allows them time to study the legal  
16 issues prior to the oral arguments. This enhances the learning process in addition to saving  
17 money.

18 Could the UJS do more if it had more money? Of course. When you look at the national  
19 scene, judicial systems in numerous states have also dealt with budget cuts. Depending on the  
20 severity of the cuts these states experienced a definite decline in access to justice. Some are  
21 questioning their ability to continue to function effectively. A newspaper from a neighboring  
22 state reported the story of a 16-year-old rape victim who simply gave up pursuing her case after  
23 spending two years waiting for the case to come to court. A municipal court system in a large  
24 city recently announced it can no longer accept new civil cases of any type simply because it has  
25 run out of paper. South Dakota, however, continues to weather the financial storm while still  
26 providing its citizens necessary access to its courts.

## 27 CAMERAS IN THE TRIAL COURTS

28 In 2008 this Legislature repealed its statute which prohibited all types of cameras in the  
29 trial courts of this state. That put the issue directly before the Supreme Court which also banned  
30 cameras by court rule. In 2009 the Supreme Court created a committee to study the issue and  
31 make a recommendation to the Court on what our policy should be. We did so knowing that  
32 some states allow no access while other states allow near total access. There clearly is no  
33 consensus. The committee was made up of representatives of all groups who participate in the  
34 legal process. We asked for a thorough report, not a quick one. The committee held several  
35 public meetings, talked to representatives from other states about their experiences in this area,  
36 and put in a lot of study and time on the subject. Ultimately three different recommendations  
37 proposing three different types of access were given to us.

38 Upon receipt of the committee report and after a public hearing before the Supreme Court  
39 in October, 2010, we undertook our own study. We concluded the proposal by the majority of  
40 the committee and supported by a significant majority of the state's trial judges, that audio/video  
41 be allowed where the parties and the judge all agree, had merit. Simply put, if all participants  
42 agree who could oppose it? However, media critics of this proposal pointed out that in

jurisdictions which have it, such as Minnesota, unanimous agreement to allow cameras in the trial courtroom is a rarity.

A second proposal set up a presumption of openness unless closed by court order. The critics of this proposal cited to fears of intimidation of lay jurors, witnesses, and parties having to face the camera. They said the "public's right to know" is limited by a defendant's right to a fair trial by jurors focusing on the evidence and not the cameras.

A third option retained the current ban which continues to exist in the federal courts of this country, including those in South Dakota.

The South Dakota Supreme Court struck a balance between the interests of public access and the right to a fair trial. We allow video access where all parties agree. Where parties fear camera intimidation and do not consent to it, we provide a second alternative. The trial judge is authorized to allow audio access in instances where the judge finds it appropriate. This allows the public to hear the testimony of the witnesses and provides the press with a record of the proceedings to report the trial in an accurate manner. Moreover, no one has objected to the use of microphones on the basis that they intimidate lay jurors, witnesses, or the parties to a proceeding. Nearly every courtroom in the state already has them.

The new system went into effect July 1, 2011. I have visited with South Dakota judges, attorneys, and the media to encourage them to make a good-faith appraisal of each request. How well will the system work? Only time and experience will provide that answer. However, on the very day the new rule went into effect, in a major murder trial in Huron, counsel and the trial court consented to audio and video coverage of the remaining portions of that trial. At a minimum this dispels the concern of some that this new rule requiring consent of counsel and the court amounts to a de facto return to the prohibition of cameras in the trial courts because such consent will be impossible to obtain.

This new system would not have come to pass without a lot of hard work by a lot of people. The Supreme Court appreciates this. It was essential to the ultimate decision we made. I look forward in future years to providing this Legislature and the public with a more definitive answer based on actual experience. Moreover, the Supreme Court retains the option to modify this plan depending on how things work out or when times and circumstances change.

## **SUBSTANCE ABUSE COURTS**

Despite very limited funds, our drug and alcohol specialty courts continue to do a phenomenal job. This lack of funding has actually resulted in creative ideas on how to accomplish more with less.

The Northern Hills Drug Court expanded this year to include the Rapid City area. The cooperative agreement between the Seventh and the Fourth Circuits allowed this to happen without additional funds by reassigning two court service officers from Rapid City to the drug court program. This resulted in the enhanced program taking additional participants from the Seventh Circuit.



1 Through federal grants we are well on our way to training staff for the creation of drug  
2 court type programs in the Aberdeen and Mitchell areas. These trained individuals await only  
3 the acquisition of funds to commence programs in their locales.

4 With both the Northern Hills and Pierre substance abuse court programs operating at a  
5 success rate of 90% this method of dealing with substance abuse felons is an absolute bargain.  
6 It provides a permanent solution rather than the revolving door of untreated incarceration. It  
7 hopes to avoid the "cured this week-an addict next week" syndrome. The participants in the  
8 Northern Hills Drug Court Program have 91 years of penitentiary time hanging over their heads.  
9 They will never serve a day of this time if they successfully complete the program. That is  
10 91 years the taxpayers do not have to pay for. Moreover, they have 19 children who will not  
11 become wards of the Department of Social Services at \$10,000 per year per child. This is  
12 because current participants are maintaining sobriety.

13 Statistics sometimes push aside the human factor. This May I was able to attend the drug  
14 court graduation in the Northern Hills. I was talking to a participant who was in her  
15 mid-twenties. Suddenly she simply said, "This has saved my life." A week later I was able to  
16 attend the graduation for the Pierre alcohol abuse court. As I was preparing to leave, a mother  
17 of a graduate came up, gave me a hug and whispered in my ear, "Thank you for giving me my  
18 son back." If one asks me after 26 years as a judge, why I became one in the first place, you just  
19 received your answer.

20 Sadly, we do not fare very well when compared to other states. According to the U.S.  
21 Department of Justice statistics for the year ending 2009, South Dakota ranks dead last among  
22 the 50 states in the number of substance abuse courts. Compare our two such courts with our  
23 neighboring states of Montana (23), Wyoming (20), Nebraska (25), Iowa (29), Minnesota (41),  
24 and North Dakota (12).

## 25 **ALTERNATIVE SENTENCING TO INCARCERATION**

26 As I deliver this message to you, there are approximately 10,000 South Dakotans on  
27 probation and under the supervision of UJS court services officers. To put it another way we  
28 now have 500 more persons on probation than we had two years ago when I talked to you about  
29 this subject.

30 Probation as an alternative to incarceration results in significant savings to the State.  
31 Probation costs \$3.00 per day. Incarceration costs \$63.69 per day. Moreover, the record of  
32 success in supervising individuals on probation is impressive by any standard. Nearly 94% of  
33 adults on probation successfully remained on probation or successfully completed it in FY2011.

34 However, there is major cause for concern. With an annual increase in the number of  
35 people placed on probation, to continue this kind of success we must have corresponding  
36 numbers of court service officers to effectively supervise the 10,000 probationers. It must be  
37 kept in mind that people on probation, if adults, are convicted criminals and, if under the age  
38 of 18, most are juvenile delinquents. There is no legal way to cap the number of people placed  
39 on probation. At some point we will either have to suffer a decline in the quality of services  
40 provided with a corresponding threat to the public order, or increase the number of court service  
41 officers. As more individuals are sent to our corrections facilities we are forced to build

1 additional prisons and hire more guards and staff. It is no different when more people are placed  
2 on probation. The existing probation system can only accommodate so many people.

### 3 **DECLINE OF ATTORNEYS IN RURAL AREAS**

4 For several years I have discussed the pending crisis in the availability of attorneys in rural  
5 areas. This is no longer a pending crisis; it is now simply a crisis which is here. No attorneys  
6 equates with no access to legal services. This equates with no justice. At this point the problem  
7 at least has been publicly identified.

8 A hospital will not last long with no doctors and a courthouse and judicial system with no  
9 lawyers faces the same grim future. Rural lawyers should not suffer the same fate as the country  
10 school house or the drive-in theatre. In the end, without access to local legal assistance, it really  
11 does not matter very much whether the courthouse doors are locked or open to the public.

12 The State Bar under the leadership of President Patrick Goetzinger has organized a Rural  
13 Practice Task Force. This will allow a detailed examination of the nature of the problem and  
14 what specific proposals should be considered to reverse this trend. I hope in the coming years  
15 to report to you about the specifics of this undertaking and its positive results.

### 16 **PROTECTION OF THE ELDERLY**

17 The Book of Ecclesiastes observed thousands of years ago that "For everything there is a  
18 season." For many of us who live in South Dakota, the fall of our lives is when we become  
19 senior citizens. Some of us are already there and the rest of us, if we are lucky, will get there.  
20 In the past few years I told you of the need for increased protection for our seniors. This year  
21 I would like to visit the subject in more detail.

22 The Baby Boomer generation, those born post-World War II, constitutes a huge block of  
23 our population. This group by its sheer size has contributed to the amount of cases brought to  
24 our court system. In its youth, this group increased the number of delinquency and status-offense  
25 cases. Juvenile cases were taken from the jurisdiction of part-time county judges to general  
26 jurisdiction circuit courts. Juvenile probation programs and care facilities were the result. When  
27 this group moved into young adulthood the criminal caseload saw an increase. As an example,  
28 over the past 25 years the increase in incarcerated women rose more than tenfold in South  
29 Dakota largely because of illegal drugs. As the baby boomers began raising families, divorce,  
30 domestic-violence, and child abuse and neglect caseloads soared. To deal with the increase, the  
31 UJS adopted case management systems which rely heavily upon computers and software. We  
32 created or supported expanded adult probation programs including intensive probation and drug  
33 courts. We worked with other state and local agencies to create domestic abuse shelters.  
34 Domestic protection order statutes were enacted. Now the oldest of the Baby Boomer generation  
35 has arrived at senior citizen status. Between 2000 and 2030 the number of senior citizens in our  
36 nation will double.

37 When one thinks of elder abuse, financial exploitation usually comes to mind. However,  
38 abuse of the elderly can take many forms-physical abuse, sexual abuse, psychological abuse,  
39 financial exploitation, and neglect. Often a victim can be abused in more than one manner. Not  
40 surprisingly, a federal study concluded victims of elder abuse have a shorter lifespan. Multiple

1 perpetrators are becoming more frequent. Over 90% of perpetrators are family members. The  
2 federal study also concluded that abuse can occur in any community and involve older adults  
3 in any socioeconomic, racial, or ethnic group. Two-thirds of the victims are women.

4 Nationally only one in fourteen incidents of elder abuse in domestic settings comes to the  
5 attention of the courts and law enforcement. To the untrained eye, signs of elder abuse are often  
6 difficult to spot, often much more difficult than child abuse. Worse yet, only one in twenty-five  
7 incidents of financial exploitation is brought to the attention of authorities. This is due, in part,  
8 to the change in our society. Gone are the days when a neighborhood remained stable and each  
9 household looked out for its neighbors. Adult children of seniors often remained close by or  
10 even in the same household. Today, with increased mobility, divorce, declining birth rates,  
11 increased life spans, and other factors, this stability has, to a significant extent, disappeared. As  
12 a young boy with a paper route, I remember being instructed by my mother to report to her if  
13 certain houses where seniors lived had more than two days of papers in the doorway.

14 Many seniors are in need of assistance. While the vast majority of guardians are honest and  
15 conscientious, we have few mechanisms to ferret out those who are not. The bulk of shared  
16 ownership or authority over finances is not in court supervised guardianships. Rather, it is in  
17 joint tenancy bank accounts which are unregulated and do not protect against theft or unfair  
18 treatment of a senior's interests.

19 In an effort to determine more accurately if South Dakota has a problem in this area and  
20 if so, to what an extent, last year I polled South Dakota's judges to find out their experiences  
21 with elder abuse. I had a good response to a questionnaire I sent them. About half of the judges  
22 identified the issue as "rare" or "only see about one case a year." However, the other half  
23 indicated they had seen instances of improper management of assets by guardians, personal  
24 representatives of an estate, joint tenants, a relative, a family friend, power of attorney, or an  
25 attorney at law. One even mentioned concern over improper solicitation of incapacitated seniors  
26 for what were purported to be "religious contributions." Another judge described the abuse she  
27 had witnessed as "horrendous." One mentioned a power of attorney "improperly cleaned her out  
28 in 60 days-\$400,000." One judge concluded, "Blood is thicker than water. Money is thicker than  
29 blood." If there is good news in the survey it is that none of the judges saw evidence of physical  
30 abuse of seniors who came before them. However, several judges cautioned that if a senior had  
31 been physically abused, it was highly unlikely they would be brought into the courtroom by the  
32 likely perpetrator. Several added they saw more of this type of misconduct when they were  
33 practicing law than after they became a judge. The bottom line is that elder abuse exists in South  
34 Dakota although the extent is unknown.

35 Although I am talking about the problem in the context of South Dakota, it exists in every  
36 other state. The problem is real and is getting larger as the population gets older.

37 As a federal study pointed out, in addition to the elderly who are the outright victims of  
38 such abuse, elder abuse imposes an economic burden on all Americans. Victims incur higher  
39 health care expenses, further straining already overtaxed Medicare, Medicaid, county poor relief,  
40 and the demand for supportive services. It leaves older adults without the means to live  
41 independently and forces them to rely on publicly supported long-term placements. As the  
42 number of us who age continues to grow, so will the problem. By 2020 the number of us over  
43 65 will increase by over 50%.

For the past two years in my annual message to you, I pointed out that South Dakota had very few laws on the books for the protection of its senior citizens. I was very pleased that last session, this Legislature passed Senate Bill 14. It, for the first time, requires mandatory reporting of known or suspected elder abuse. This is a great step forward in identifying those who may be victims. Moreover, its passage by a vote of 105 to zero sends a strong message that the State of South Dakota is serious about protecting the lives, health, and rights of its senior citizens.

Additionally, the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act passed this Legislature last year with the support of 104 votes. This legislation was in response to issues that can arise as a result of a dispute between family members and, for many of us, introduced a new term to our vocabulary, "granny-snatching." This is a term that is used when, for example, a son or daughter invites elderly parents from out-of-state for a visit and then files for a guardianship over them in the son or daughter's home state in an effort to gain control over the elderly parents and their assets-even though the parents may have no real connection to the state they are visiting. This Act provides the courts substantial guidance in determining which state has jurisdiction to appoint a guardian or conservator and establishes a procedure for transferring a legal guardianship from one state to another. It recognizes and gives full faith and credit to a guardianship order from another state. It is another tool to allow the courts to take action to detect situations where elder abuse is occurring or may be likely to occur and to prevent or stop the problem.

As the book of Proverbs admonishes, "When justice is done, it is a joy to the righteous but dismay to evildoers." The problem needs to continue to be addressed in a coordinated, not piecemeal, manner.

### **FAMILY LAW AND SELF-REPRESENTATION**

This past legislative session fiscal matters did not dominate all that this Legislature considered. If my memory serves me correctly, for each one of the 16 years I have served on the South Dakota Supreme Court, there have been one or more bills dealing with the subject of child custody between parents who no longer live in a single household. Few subjects produce the emotions that arise from this issue.

While the subject of how a judge determines custodial rights of parents is very important, let me suggest that the presentation of the facts to the judge to make that crucial decision is equally important. No matter how compelling the facts are, if the parents cannot get them properly in front of the judge, the correct decision may never come about.

Unfortunately, child custody disputes seem to have a constant shadow of poverty. In my experience home studies by trained professionals are of assistance to the judge. However, such studies can run \$5,000 or higher. Regrettably, most parents who came into my court in custody cases, could not even afford the \$50 filing fee for the divorce, let alone an expensive home study.

The costs for an attorney to guide the parent through the legal proceedings may run from \$150 to \$275 per hour. This is beyond the financial means of many. In response to this, the Access to Justice Program of the State Bar provides attorneys who are willing to take cases without a fee to those who need such help. Last year 317 lawyers agreed to represent these

1 people for no fee. The number of volunteer lawyers has been increasing each year. However,  
2 only 140 of those attorneys are willing to take family law cases. This is unfortunate because  
3 83% of the requests for help come from those needing legal assistance in the family law area.

4 The people assisted by Access to Justice are the fortunate ones. Others of limited means  
5 who do not have access to this fine program are simply on their own. The UJS has drafted forms  
6 to assist people who represent themselves in divorce and custody proceedings. This is no small  
7 group. Two years ago, I informed you that a Chief Justice from another state told me that  
8 70% of the divorce proceedings in her state were being handled without the assistance of an  
9 attorney. A year later when I visited with her she said, "That figure of 70% is no longer  
10 accurate." After a pause, she added, "It is now 80%." This summer she told me the figure stands  
11 at 82%.

12 Law students from the University of South Dakota did not spend their spring break taking  
13 it easy or studying for finals. Instead, in cooperation with Dakota Plains Legal Services, several  
14 of them went to three of South Dakota's reservations to write wills for tribal residents. This gave  
15 tribal members the benefit of leaving their property to who they wanted rather than following  
16 set state or federal rules for disposition.

17 In South Dakota we provide forms at little or no cost for pro se litigants who wish to use  
18 our courts for family law matters. Although we have tried to make the forms as simple as  
19 possible, they still cause problems for some people seeking to use them. The RD Hurd Society  
20 of the University of South Dakota School of Law set up a program so that people seeking help  
21 with the forms can call for assistance at no cost. As of last September law students assisted  
22 150 callers. There has not been a single complaint received about the quality of the assistance.

### 23 **COURTHOUSE SECURITY AND IMPROVEMENTS-PART ONE**

24 From time to time I have commented on the security in South Dakota courthouses. In a  
25 few, the security is excellent. In some, security is basically non-existent. Since 9-11 in many  
26 instances, we in South Dakota have viewed incidents of violence and efforts to halt them with  
27 increased security, with curiosity rather than action. Because of our rural Midwestern location,  
28 we believed that we had nothing to fear from terrorists.

29 When one looks at the protection of public buildings and those who enter them, you may  
30 recall that last year a student stockpiled bomb making materials that he intended to use to blow  
31 up Sisseton High School. This resulted in a "near-miss" of a tragedy. This should be a wake-up  
32 call that a threat does not necessarily emanate from the Middle East. A threat can come from  
33 within our own population. A threat does not take a concentrated effort by numerous  
34 conspirators. A single misguided person can present a clear and present danger.

35 We all aspire that our home towns will raise a native son or daughter to be a leader of  
36 government such as a future President or Governor. Yet we must confront the sobering prospect  
37 that we may instead be raising a future demolisher of that government.

38 The tensions that flow from court proceedings unfortunately also contribute to the risks of  
39 violence. Several decades ago in Rapid City an attorney was shot and killed and the judge was  
40 critically wounded in what was supposed to be a simple divorce proceeding.

1 The need for increased courthouse security is shared with the counties. Counties are  
2 responsible for the physical structure of the courthouse and the local sheriff has the  
3 responsibility to provide the personnel to protect those within the courthouse.

4 For many years, the UJS offered matching 50-50 grants to the counties for courthouse  
5 security improvement. With an annual appropriation of \$50,000 and 65 county courthouses, this  
6 has not been sufficient to provide for structural changes such as separate elevators for criminal  
7 defendants. That modest amount was cut to \$10,000 due to the recent budget issues.

## 8 ECONOMIC EXPANSION

9 South Dakota is undergoing temporary economic difficulties. One must, however, be  
10 optimistic about our long-term future. That bodes well for the state and the Unified Judicial  
11 System.

12 In 1889 most businesses were a 160 acre farm with the labor force consisting of a single  
13 farmer and his horse driven plow. Legal disputes which flowed from such an environment were  
14 few and far between. Today our state is still significantly dominated by the agricultural sectors  
15 although now under the label of "agri-business industries." This has led to an increase in the  
16 amount and sophistication of litigation in this area.

17 Since the 1980's when this Legislature repealed the usury laws, South Dakota has  
18 developed an extensive banking industry mainly focusing on credit cards. While we have  
19 experienced some litigation from this development, most banking regulation is done at the  
20 federal level and not in state courts.

21 In the 1980's this Legislature repealed the rule against perpetuities. While even law  
22 professors and judges debate what the rule meant, we do know that its repeal allows trusts and  
23 similar legal instruments to go on indefinitely. This unique economic situation has resulted in  
24 a quiet, but very significant, infusion of trust funds into South Dakota. A 2010 article in Trusts  
25 and Estates Magazine examined the trust laws of all 50 states to determine which were favorable  
26 to trusts. It concluded that of the top four states, South Dakota ranked first. This status has paid  
27 off because South Dakota has experienced a growth in private trust company assets from zero  
28 in the mid-1980's to approximately \$75 billion in 2011. Although the exact figure is unknown,  
29 an additional \$25 to \$50 billion is believed to be held by public trust companies within our  
30 borders. One attorney who specializes in this area told me that South Dakota has quietly grown  
31 the change in our trust laws into a major industry which is the envy of other states. It brings with  
32 it high paying jobs and no pollution problems.

33 The regulation of trusts of this amount and potential litigation between parties involved in  
34 the trusts will undoubtedly generate sophisticated litigation in our state courts. We have already  
35 seen a few cases at the Supreme Court level. Some states such as Delaware have created  
36 specialty courts which deal with nothing but business cases. South Dakota attorneys who  
37 practice in this area have advised me that they feel we are better off having business litigation  
38 remain in our circuit courts, the courts of general jurisdiction.

**JUSTICE JUDITH K. MEIERHENRY**

Individual Justices come and go while the Supreme Court as an institution of government continues. This past year we said farewell to one of our very best when Justice Judith K. Meierhenry retired. Her judicial career on the Circuit Court and Supreme Court spanned decades of service to our citizens. While on the Supreme Court she advanced the state of the law and oversaw or contributed to numerous projects to improve the judicial system.

However her greatest achievement in my opinion is as a symbol to half our population. When she became a Circuit Judge in 1988 there had not been a single woman judge in South Dakota since Judge Mildred Ramynke retired in 1984. Justice Meierhenry repeated the feat in 2002 when she became the first woman to serve as a permanent Justice on the South Dakota Supreme Court. Today that seems odd given the fact that a good portion of our bench and bar are female and the classes at the Law School are 50% female or more. All owe a significant debt to this jurist who led the way. She succeeded not by telling others how to do it, but by example-she showed them how to do it. In uncharted waters, as with a lead boat, she provided smooth sailing for those who followed in her wake.

**JUSTICE LORI S. WILBUR**

Justice Lori S. Wilbur was appointed in August to replace Justice Meierhenry. This appointment drew praise from every segment of the State. As a former law clerk for the Supreme Court she has, in essence, "come home." She is uniquely qualified to hold the position of Justice because she has held every other judicial position in South Dakota beginning as a part-time Magistrate all the way to assuming the responsibilities of a Presiding Circuit Judge. She will, in the coming years, make significant contributions to our Court and its legal scholarship.

Personally I have known Justice Wilbur since law school days. Her unfailing fairness and positive temperament have impressed all who have appeared in front of her. Not only is she a first-class judge, she is a first-class human being.

**COURTHOUSE SECURITY-PART TWO**

On a lighter note concerning courthouse security, the Kingsbury County Courthouse was closed on March 10 and 11, 2011. Apparently a skunk breached courthouse security and occupied the building. The skunk strongly let its views be known while in the building. There are certain events that even the wheels of justice cannot overcome.

However, within days of the attack and with it believed the perpetrator was still on the loose and possibly even in the building, the circuit judge entered the courtroom under what can only be described as trying circumstances and proceeded with the regularly scheduled court docket. Although it was subsequently determined the perpetrator did not survive this attack, the possibility of co-conspirators exists who have not been apprehended and thus the potential for a repeat attack exists. Those who provide our court security advise that normal electronic detection devices are useless and that volunteers to conduct a personal pat-down search will be very difficult to find.

1 This underscores in a humorous manner the deadly serious lesson that in security protection  
2 one must be prepared for literally anything.

### 3 TEN YEARS

4 This marks the tenth time I have been privileged to appear in front of you to deliver the  
5 State of the Judiciary Message. Although the first year or so brought with it some nervousness  
6 on my part, I now look forward to the opportunity to share with you those matters which I think  
7 are of importance when one looks at the subject of the South Dakota judicial system and how  
8 it affects our citizens.

9 Today I have spoken of a flood of Biblical proportions, financing a court system in a  
10 recession, cameras in the trial courts, protection of the elderly, self representation in family law  
11 cases, courthouse security and improvements, and economic expansion through liberalization  
12 of trust laws. While some may think a judicial system moves at the speed of a lethargic glacier,  
13 if one looks at my initial outing in 2003, none of those topics were discussed that day nor were  
14 many of them even considered major pending issues.

15 It is clear that times change and that judicial systems must evolve with them.

### 16 CONCLUSION

17 This past year a friend of mine gave me a gift. He had made a judicial gavel. The head of  
18 the gavel is not the traditional round one which is used to maintain order in the courtroom.  
19 Instead the head of the gavel is a claw hammer. My friend said it was given to me as a judge to  
20 "build things." I was astounded at the wisdom of his observation and somewhat humbled that  
21 after 26 years in the judiciary, this fundamental concept had not crossed my mind.

22 While the future is uncertain, what is certain is that society expects the judicial system of  
23 today and tomorrow not merely to sit in isolated courthouses adjudicating disputes and sending  
24 the litigants on their way. The judicial system must be pro-active and follow through in  
25 supervising juvenile and adult probation, breaking the cycle of alcohol and drug addiction,  
26 protecting and supporting children, providing domestic protection orders, and protecting our  
27 elders. As society's problems become more complex, this list increases. There is no turning  
28 back. When eyeing the future, we are either stagnant as a system or moving forward. There is  
29 no reverse gear to repeat the past. Lincoln's admonition that, "We must think anew and act  
30 anew" is most appropriate.

31 Respectfully submitted  
32 David Gilbertson  
33 Chief Justice